



May 17, 1999

Mr. Merrill E. Nunn
City Attorney
City of Amarillo
P.O. Box 1971
Amarillo Texas 79105-1971

OR99-1347

Dear Mr. Nunn:

You have asked whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 124380.

The City of Amarillo (the "city") received a "Notice of Claim" from an attorney, which your office out of an abundance of caution has treated as an open records request, because it contains a request for "copies of all documents in your internal investigations file," concerning a specified incident. In response to the request, you submit to this office for review a copy of the records which you assert are responsive. You assert that the requested information is excepted from required public disclosure pursuant to sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You contend that release of the requested information is governed by section 58.007 of the Family Code in conjunction with section 552.101 of the Government Code.

In Open Records Decision No. 644 (1996), this office ruled that section 58.007 of the Family Code does not make confidential juvenile law enforcement records concerning juvenile conduct occurring on or after January 1, 1996 that are maintained by law enforcement agencies. However, the Seventy-fifth Legislature passed House Bill 1550¹, which amends the Family Code and in part overrules Open Records Decision No. 644 (1996). The relevant language of amended Family Code section 58.007(c) reads as follows:

- (c) Except as provide by Subsection (d), law enforcement records and files concerning a child may not be disclosed to the public and shall be:

¹ Act of June 2, 1997, H.B. 1550, 75th Leg., R.S.

- (1) kept separate from adult files and records; and
- (2) maintained on a local basis only and not sent to a central, state or federal depository, except as provided by Subchapter B.

Thus, juvenile offender records held by law enforcement agencies are now expressly confidential under section 58.007(c) of the Family Code. Section 58.007(c) applies to juvenile law enforcement records concerning conduct that occurred on or after September 1, 1997. Open Records Decision No. 644 (1996) still applies to records concerning juvenile conduct that occurred from January 1, 1996 to August 31, 1997.²

Here, the requested information involves juvenile conduct that occurred after September 1, 1997. Since section 58.007(c) of the Family Code applies to juvenile law enforcement records concerning juvenile conduct occurring on or after September 1, 1997 that are maintained by law enforcement agencies and none of the exceptions in section 58.007 apply, some of the requested information is confidential pursuant to section 58.007(c) of the Family Code. Thus, you must withhold the information concerning the juvenile conduct, in this case incident report number 98-80057, under section 58.007(c) of the Family Code in conjunction with section 552.101 of the Government Code.

Since the remaining submitted records concern an investigation of a complaint made against the arresting officers by the mother of the juvenile offender, we conclude that such records are not subject to section 58.007 and must be addressed under your other claimed exception.³

Section 552.103(a) excepts from disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

²Juvenile law enforcement records concerning conduct that occurred before January 1, 1996, are governed by former section 51.14(d) of the Family Code, which is continued in effect for that purpose. Act of June 2, 1997, H.B. 1550, 75th Leg., R.S.

³Furthermore, we note that under section 58.007, subsection (b)(3), the records and files of a juvenile court are open to inspection by "an attorney for a party to the proceeding."

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103(a). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the city must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989).

Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In this instance, you state that the requestor's "demand for records related to an arrest, . . . is contained in a notice of claim and a threatened lawsuit." You have supplied to this office the "Notice of Claim" letter to support your claim under section 552.103.⁴ However, it does not appear at this time that an attorney has threatened the city with a lawsuit, nor have you provided any concrete evidence to support a claim that litigation is reasonably anticipated. *See* Open Records Decision Nos. 361 (1983), 346 (1982). We conclude that you have failed to meet the requisite showing that litigation is reasonably anticipated. Therefore, you may not rely on section 552.103 to withhold any of the remaining information, not subject to section 58.007, from the requestor.

³ Under Open Records Decision No. 638 (1996), a governmental body may establish that litigation is reasonably anticipated by showing that (1) it has received a claim letter from an allegedly injured party or his attorney, and (2) the governmental body states that the letter complies with the notice of claim provisions of the Texas Tort Claims Act ("TTCA") or applicable municipal statute or ordinance.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink that reads "Sam Haddad". The signature is fluid and cursive, with a large loop at the beginning of the first name.

Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID# 124380

Encl: Submitted information

cc: Mr. Mark H. Taboada
P.O. Box 2682
Amarillo, Texas 79105
(w/o enclosures)